No. 90-173

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

GARY D. SWANK,
Petitioner,

vs.

JAMES SMART, Individually and as City Marshal, City of Carthage, Illinois; JAMES R. NIGHTINGALE, Individually and as Mayor of the City of Carthage and as a member of the City Council of Carthage, Illinois; WILLIAM TOMLINSON, Individually and as a member of the Public Safety Committee of the City Council of Carthage, Illinois; WILLIAM REED, Individually and as a member of the City Council of Carthage, Illinois; RAYMOND MYERS, Individually and as a member of the City Council of Carthage, Illinois; and the CITY OF CARTHAGE, ILLINOIS, an Illinois Municipal Corporation,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Is the decision of the Seventh Circuit Court of Appeals in *Swank v. City of Carthage* consistent with and mandated by applicable precedents of this Court?

2. Is that interest protected by the Constitution as "expressive association" implicated when the only "relationship" between Plaintiff, an off-duty policeman, and a student at a local college was a 20-minute motorcycle ride without prior or subsequent contact between the parties?

3. Is that interest protected by the Constitution as "individual liberty" implicated when the only "relationship" between Plaintiff, an off-duty policeman, and a student at a local college was a 20-minute motorcycle ride without prior or subsequent contact between the parties?

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STATEMENT OF FACTS

Respondents have no quarrel with Petitioner's Statement of Facts so far as it goes. It does not, however, place the issues raised in this case

in proper perspective. Gary Swank had numerous problems functioning as a Carthage police officer over a period of time. During the course of his employment he had been advised by the Public Safety Committee of perceived deficiencies in his performance and the Committee's dissatisfaction ultimately resulted in his being placed on probation for a period beginning July 23, 1986, and ending October 1, 1986. The events leading to his discharge occurred while he was still on probation.

As stated by the Court of Appeals in its opinion, Petitioner's actions on September 24-25, 1986, represented an "appearance of impropriety." The Court noted that Swank, as a married man, displayed poor judgment in giving a teenage girl whom he had never met before a motorcycle ride late at night. The Court further observed that, while the incident seems trivial by itself, . . . "it *was* his third strike, so it is no surprise that he was called out."

REASONS FOR DENYING THE WRIT

A. There Is No Conflict Between The Seventh Circuit Decision In This Case And The Two Decisions Of Other Circuit Courts Of Appeals Cited By Plaintiff.

1. In *Lutz v. City of York, Pa.*, the Third Circuit Court of Appeals Considered Whether There Is a Constitutionally-Protected Right to Intrastate Travel. This Interest Was Not Considered or Addressed By the Seventh Circuit in *Swank v. City of Carthage.*

Petitioner asserts in at least four places in his Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit (hereinafter "Petition") that the Third Circuit in *Lutz v. City of York, PA.*, 889 F.2d 255 (3rd Cir. 1990), had found that "the right" which he had asserted was a fundamental right. At pages 9-10 of the Petition, he states:

> "But, in an opinion released the day after the Seventh Circuit decided this case, the Third Circuit in *Lutz v. City of York, Pa.*, (citation omitted) *held that the right asserted by Petitioner in this case is fundamental.* * * * On that basis the Third Circuit in *Lutz*, supra, held that *'the right to move freely about one's neighborhood or town, even by automobile*, is indeed "implicit in the concept of ordered liberty" and "deeply rooted in the nation's history." '(Emphasis added)

Again, in footnote 7 on page 11, Petitioner asserts:

> "[7]As observed by the Third Circuit in *Lutz, the right alleged as fundamental in this case* might be more generally posed as whether there is a fundamental right to intra as distinguished from inter-state travel. *Lutz*, supra, 899 F.2d at 258-262. (Emphasis added)

Petitioner observes, yet again, at page 12:

> *"Finding the right Petitioner is asserting in this case to be a fundamental right*, the Court in *Lutz*, supra, undertook to deter-

> mine the standard of review and to determine whether the 'anti-cruising ordinance' which was attacked in *Lutz* withstood scrutiny under that standard. (Emphasis added.)"

Finally, at page 14, Petitioner claims:

> "The Third Circuit, in *Lutz*, supra,. . . was able to conclude *that the right Petitioner has asserted in this case was indeed fundamental*. The Seventh Circuit, on the other hand, not employing any method of analysis except the concern that a public employer might be limited in its power to discipline, *concluded that the right Petitioner herein is asserting was only a 'harmless liberty' subject to regulation on any but a 'sheer unreasonableness' basis*. (Emphasis added)"

A review of the decision in *Swank v. City of Carthage*, 898 F.2d 1247 (7th Cir. 1990), plainly shows that the conduct which the Seventh Circuit classified among "harmless liberties" was not the right to intrastate travel. Rather, it was the freedom to engage in chit-chat and Petitioner's "encounter with Tina, like the encounters with strangers in a dance hall . . ." which the Court relegated to the residual bin of "harmless liberties." 898 F.2d at 1251 and 1252.

Indeed, at page 23 of the Petition, Swank concedes that Justice Stevens and Blackmun, concurring in *City of Dallas v. Stanglin*, ___ U.S. ___, 109 S.Ct. 1591 (1989) found "the very right Petitioner is asserting in this case" to be an aspect of liberty protected by the Fourteenth Amendment. His quote from *Stanglin* shows "the opportunity to make friends and enjoy the company of other people — in a dance hall or elsewhere — . . ." to the "very right."

It is apparent on the basis of these assertions that Petitioner would have this Court find a conflict between the opinions of two Courts of Appeals which were not even considering the same issues. There has never been any suggestion in this case that Respondents discharged Petitioner simply because he rode his motorcycle on and about the streets of Carthage, Illinois. Indeed, Petitioner has never advanced either claim or implication that he would have lost his job if he had not carried his young female passenger.

The heart of Petitioner's non-procedural claims has always consisted of speech, liberty, and associational interests of which Tina Millin's presence on the motorcycle was an integral part. The opinion of the Seventh Circuit reflects this focus. The 'right to intrastate travel' is nowhere mentioned because it was not an issue. Rather, the decision repeatedly refers to "the encounter" and deals with intimate and expressive association and with speech protected by either the First or Fourteenth Amendments to the Constitution.

To the extent Petitioner may be arguing simply that there is conflict in the approach used by the two Courts in determining whether an asserted right is fundamental, his argument lacks merit. The Third Circuit noted (and Petitioner has acknowledged) that there has been no determination by this Court that there is a fundamental right of intrastate travel which comprehends a right to "cruise" city streets. By contrast, the issues confronting the Seventh Circuit have been explicitly treated by this Court in its decisions in *Roberts v. United States Jaycees*, 468 U.S. 609 (1984), and *City of Dallas v. Stanglin*, ___ U.S. ___, 109 S.Ct. 1591 (1989). Apparently, Petitioner feels cheated by the Seventh Circuit's forbearance from reinventing the wheel.

Whatever the basis for Petitioner's claim of irreconcilable conflict between the Third Circuit's decision in *Lutz v. City of York, Pa.*, supra, and the Seventh Circuit's opinion in *Swank v. City of Carthage*, supra, it cannot survive scrutiny and should not support the issuance of a Writ of Certiorari.

2. In *Flanagan v. Munger*, the Tenth Circuit Was Faced With Different Facts and Circumstances But Still Applied the Same Legal Analysis As the Seventh Circuit. The Different Result Reached By the Two Courts Is Not the Type of Conflict Which Warrants the Issuance of a Writ of Certiorari.

Petitioner urges the Court to find a fundamental conflict between the Tenth Circuit's determination that the "public concern" test was inapplicable on the facts of *Flanagan v. Munger*, 890 F.2d 1557 (10th Cir. 1989), and the Seventh Circuit's application of the test to the facts in *Swank v. City of Carthage*, supra. There is, however, no conflict.

The crux of the Tenth Circuit's "public concern" analysis is as follows:

> "Thus, we conclude that the public concern test does not apply when public employee nonverbal protected expression does not occur at work and is not about work. Nevertheless, we believe an alternative test can be applied in these cases which can fulfill the same *function* as the public concert test." (Emphasis added) 890 F.2d at 1564.

The Court went on to describe the function of the public concern test as follows:

> "The *purpose* of the public concern test is to avoid raising personal personnel grievances to constitutional cases. This purpose is also served by a test which requires cases involving employee nonverbal expression which is not at work or about work to involve protected expression. In those cases the employee is not raising a personal personnel grievance, and it makes little sense to ask whether this speech is of public concern." (Emphasis added) 890 F.2d at 1565.

The *Flanagan* court then went on:

> "Applying the above test to this case, it is clear that plaintiffs' speech is protected expression. Sexually explicit films and the distribution of sexually explicit films have consistently been upheld as protected under the first amendment, whether under the free speech or free press clauses. (Citations omitted)." 890 F.2d at 1565.

The Seventh Circuit, on the other hand, specifically referred to the *Flanagan* court's discussion concerning the purpose of the test and found it unnecessary to address the issue. Why? Because it was equally clear that the activity of Gary Swank was *not* "protected speech." It was nothing more than that "kernel of expression" found "in almost every activity a person undertakes — for example, walking down the street, or meeting one's friends at a shopping . . ." which was found by this Court to be unprotected by the First Amendment. *City of Dallas v. Stanglin*, supra. Because there was no protected speech, the Seventh

Circuit did not perform the "public concern" analysis undertaken by the Tenth Circuit. There can, therefore, be no conflict in the two decisions and no foundation for issuance of a Writ of Certiorari.

B. The Decision Of The Seventh Circuit Was Rendered On The Basis Of This Court's Precedents And Does Not Conflict With Them.

Petitioner has claimed that his rights to expressive association, First Amendment free speech, individual liberty, and procedural due process were all infringed by the fact and manner of his discharge from the Carthage Police Department. He pressed those claims vigorously in the Seventh Circuit and the Court decided them on the basis of binding Supreme Court precedents. Petitioner now apparently complains that the Court gave insufficient consideration to Blackstone, Edmund Burke, and Justice Harlan's dissent in *Poe v. Ullman*, 367 U.S. 497 (1961).

As noted at page 22 of the Petition, Justice Harlan's approach in dissent was vindicated in *Griswold v. Connecticut*, 381 U.S. 479 (1965). Since then this Court has picked its way carefully through "penumbras" and "emanations" to add, gradually and very selectively, untested rights of privacy and intimacy to the core of more traditional First Amendment rights. These decisions culminated in *Roberts v. United States Jaycees*, 468 U.S. 609 (1984), which set forth definitively the rights of intimate and expressive association. It is both unnecessary and inappropriate for Courts of Appeals faced with conduct clearly defined by *Roberts* as outside the scope of expressive association to rewrite *Roberts* (beginning with Blackstone) to satisfy Petitioner's need for historical prolixity.

Similarly, *City of Dallas v. Stanglin*, supra, is dispositive of whether or not Petitioner's speech was "protected" under the First Amendment and the Seventh Circuit correctly found that it was not. Under the circumstance, even the *Flanagan v. Munger* decision, on which Petitioner has so heavily relied, would support a finding that Swank's claim was merely a "personal personnel grievance" and would not even require the balancing exercise which was performed by the Seventh Circuit.

The nature of Petitioner's interests (whether "fundamental" or not) could be and was determined on the basis of timely and binding precedents of this Court. The decision of the Seventh Circuit is not in conflict with relevant Supreme Court opinion and Petitioner's unsupported claim that it does so conflict is insufficient to justify issuance of a Writ of Certiorari.

C. The Decision Below Fully conforms With This Court's Precedents Regarding The First and Fourteenth Amendment Protection To Be Properly Accorded Petitioner's Speech.

Even though Petitioner claims in the latter part of his Brief (pages 24-30) that the Seventh Circuit's decision conflicted with Supreme Court precedents, it appears to these Respondents that it is, in fact, Petitioner who is challenging the correctness and the impact of *Roberts v. United States Jaycees*, supra, and *City of Dallas v. Stanglin*, supra. Petitioner has asserted that "[t]he Seventh Circuit's holding and analysis placed at great risk a significant amount of expressive activity engaged in by human beings in this society. This Court has never given sanction to the Seventh Circuit's approach." This assertion is patently incorrect. The Court of Appeals explicitly relied upon the *City of Dallas v. Stanglin* decision in arriving at its conclusion that "chit-chat" was subject to the "kernel of expression" exemption from First Amendment protection.

Moreover, Petitioner cites several decisions of this court acknowledging First Amendment protection of magazines and videos which are not of "any possible value to society." *Winters v. New York*, 338 U.S. 507, 510 (1948). He charges that the decision in *Stanglin* is contrary to prior decisions of the Supreme Court and has led to the "incongruous result" that the non-verbal sale and rental of sexually explicit video tapes achieved greater First Amendment protection than his "chit-chat" with Tina Millin.

It is Petitioner's argument and not the decision of the Seventh Circuit which is in conflict with current and past precedent of this court. This argument should, therefore, not serve as a basis for issuance of a Writ of Certiorari.

CONCLUSION

For all of the foregoing reasons, a Writ of Certiorari to review the judgment and opinion of the Seventh Circuit in *Swank v. City of Carthage*, supra, should be denied.

Respectfully submitted,

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